

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 21 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0240-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JASON ANTHONY SANCHEZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2005120858001SE

Honorable John R. Hannah Jr., Judge

REVIEW GRANTED; RELIEF DENIED

Jason Anthony Sanchez

Tucson
In Propria Persona

B R A M M E R, Judge.

¶1 Pursuant to a plea agreement entered in September 2005, petitioner Jason Sanchez was convicted of one count of aggravated assault. The trial court suspended the imposition of sentence and placed him on four years' probation. In this petition for review, he contends the court abused its discretion when it denied his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Therein, he claimed the court had lacked jurisdiction to revoke probation on August 30, 2010, and sentence him to prison

because a petition to revoke probation never had been filed with the clerk of the court and that trial counsel had been ineffective because she had not pointed this out to the court or sought the dismissal of the revocation and disposition proceedings. We will not disturb the court's ruling unless it abused the discretion vested in it to decide whether post-conviction relief is warranted. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶2 Sanchez's probation began on November 4, 2005, and was interrupted when he committed a new offense in March 2006. The court found he violated probation based on that offense in June 2006 and reinstated probation in July 2006 for a two-year period, which was to commence upon his release from prison in CR 2006-115002-001-DT. It appears that probation thus began again on December 20, 2007. On November 15, 2009, Sanchez was arrested on new charges. At a change-of-plea/revocation hearing on July 8, 2010, he pled guilty to weapons misconduct by possessing a firearm as a prohibited possessor in CR 2009-172014-001, admitted he had been on probation at the time in this case, and acknowledged by admitting the new offense he necessarily was admitting he had violated the terms of probation. On August 30, 2010, the trial court revoked probation and sentenced Sanchez to the presumptive prison term of 3.5 years, granting him 535 days' credit for presentence incarceration.

¶3 Sanchez argued in his Rule 32 petition that the trial court had lacked jurisdiction to revoke probation because, although he did not deny he had a copy of the petition to revoke the probation officer signed on November 18, 2009, that petition never was filed with the clerk of the court. Thus, relying to a large degree on *State v. Chacon*,

221 Ariz. 523, 212 P.3d 861 (App. 2009), he argued that under A.R.S. § 13-903(D), the period of probation never was tolled and had expired on December 20, 2009. He also argued trial counsel had been ineffective because she had failed to point this out to the court and had failed to request that the revocation proceeding be dismissed.

¶4 In denying relief summarily and dismissing the petition for post-conviction relief in August 2011, the trial court noted Sanchez had been arraigned in connection with the revocation of probation separately from his arraignment in the case involving the new offense, CR 2009-172014-001-DT. The record before us includes the minute entry from the November 20, 2009 arraignment on the revocation, which states Sanchez had denied the “alleged violation of probation,” suggesting at the very least he had received a copy of the petition to revoke probation. Stating it had reviewed the minute entry from the arraignment on the violation proceeding as well as the video recording of that arraignment, the court added, “[T]he revocation arraignment could not have gone forward without a revocation petition having been submitted to the Commissioner.”

¶5 The trial court concluded a petition to revoke probation had been given to the commissioner and that this constituted filing for purposes of the statutes applicable to revocation proceedings. Thus, the court both relied on and distinguished *Chacon*. In *Chacon*, the first of two revocation petitions had been signed by the probation officer in July 2007 and apparently given to the commissioner before the defendant’s probation had expired, but not filed with the clerk’s office until after the defendant’s probation had expired. 221 Ariz. 523, ¶ 2, 212 P.3d at 863. The state withdrew that petition, however, when no charges were brought against the defendant in connection with the offense that

had been the basis for that petition. *Id.* ¶ 4. The probation officer prepared a second petition on September 20, 2007, just before the defendant’s probation was to expire on September 24, 2007. *Id.* ¶¶ 2, 3. But, the court found and the state conceded, “[t]here [was] no evidence that the September petition was ever signed or dated by the trial court or filed with the court clerk’s office.” *Id.* ¶ 3. The court concluded in *Chacon* that the trial court lacked subject matter jurisdiction to revoke the defendant’s probation because the September petition to revoke had not been filed with the clerk of the court before the defendant’s probation had expired. *Id.* ¶¶ 5-8.

¶6 As the trial court in the case before us noted when it denied post-conviction relief, the court in *Chacon* had commented, “Assuming without deciding that the [first] petition was timely filed when it was delivered to the Commissioner, that did not relieve the State of the duty to timely file the September petition.” *Id.* ¶ 8. The court here found, however, that the revocation petition had to have been given to the commissioner because the arraignment would not have gone forward otherwise. The court also found this case distinguishable from *Chacon*, because in that case “there was nothing in the record indicating that court had *ever* acted on the revocation petition prior to the expiration of the probation term.” Thus, although the court here acknowledged the revocation petition did not “appear in the docket, for unknown reasons,” it concluded the petition was filed when “submitted to the Commissioner and acted on by her at the revocation arraignment, regardless of whether the petition subsequently [found] its way into the docket.” Consequently, the court reasoned, counsel had not been ineffective for failing to file a

motion to dismiss the petition to revoke, implicitly concluding any such motion or request would have been denied.

¶7 In his pro se petition for review, Sanchez essentially restates the claims he had raised and arguments he had made in the trial court. He has not, however, sustained his burden of showing the court abused its discretion. He has not persuaded us that the court incorrectly presumed the petition had been filed before or at the arraignment and thus before Sanchez's probation had expired, despite its troubling absence from the docket. As the state pointed out in its response to Sanchez's petition for post-conviction relief, Rule 35.5, Ariz. R. Crim. P., states that "[u]nless otherwise specified in these rules," the filing of pleadings, motions, petitions and other documents is to be governed by Rule 5, Ariz. R. Civ. P. And Rule 5(h) requires that all "pleadings and other papers" be filed with the clerk of the court but gives judges the authority to accept filings.

¶8 Sanchez did not provide this court with the video recording of the arraignment, which the trial court stated it had reviewed, and consequently we presume it would support the court's conclusion the commissioner had the petition before her and available for filing before or at the November 2009 arraignment. *See State v. Wilson*, 179 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993). Additionally, Rule 27.8, Ariz. R. Crim. P., supports the inference the commissioner had the petition to revoke before her at the time of the arraignment. The rule makes clear that the court must review the allegations of a petition to revoke probation with the defendant, after which the defendant must admit or deny them. Ariz. R. Crim. P. 27.8(a)(2). The record shows Sanchez denied the allegations at the arraignment. That the commissioner may have neglected to

ensure the petition was filed with the clerk of the court, as the rule required the commissioner to do, did not deprive the court of subject matter jurisdiction to permit the revocation of probation to proceed.

¶9 Finally, Sanchez has not established the trial court abused its discretion in rejecting his claim of ineffective assistance of counsel. Sanchez has not established the court erred in finding the probationary period was tolled either before or at the November 2009 arraignment before the period of probation would have expired in December. Any technical error would not have warranted the dismissal of the revocation proceeding. Thus, counsel's performance was neither deficient nor prejudicial, given the circumstances of this case. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶10 For the reasons stated, we grant Sanchez's petition for review but deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge